MOHD. RAMLY ISMAIL

v.

SARIMAH FILM PRODUCTION SDN. BHD. & ANOR.

HIGH COURT MALAYA, KUANTAN
MOHAMED DZAIDDIN J
[CIVIL SUIT NO. 68 OF 1981]
8 AUGUST 1983

COPYRIGHT: *Film production - Definition of literary work - Whether manuscript a piece of dramatic or literary work - Whether protected under the Copyright Act - Burden of proof - Essential elements in proving authorship - Copyright Act 1969, ss. 2, (1), 4(1), 5(1).*

The dispute evolved around the film "Dia Ibuku". The plaintiff claimed that he was the author and owner of the copyright in a literary or dramatic work having a similar title as the film and that the 1st defendant had plagiarised his work by adapting or substantially reproducing the said work into the motion picture "Dia Ibuku". As against the 2nd defendant, the plaintiff alleged the distribution of the said film. The plaintiff claimed for a declaration as to authorship, an injunction restraining both defendants from letting or distributing the said film and for damages, accounts of profits, delivery of all infringing films and costs.

In the defence, the defendants deny that the plaintiff was the author and owner of the copyright in the literary work entitled "Dia Ibuku". By way of counterclaim, the defendants sought a declaration that the copyright in "Dia Ibuku" belonged to the 1st defendant or alternatively, that such rights in the work have not been acquired by the plaintiff in Malaysia under the provisions of the Copyright Act 1969.

Held:

[1] That the basis of the plaintiff's claim was for a long time based on his stage-play of a similar name rather than the manuscript of the film "Dia Ibuku".

[2] Definition of "literary work" covers that which is expressed in print or writing.

[3] Eligibility of literary work for copyright protection is stated in s. 4 (1) Copyright Act. The burden of proof is on the party asserting authorship to show that sufficient effort has been expended on making the work to give it an original character.

[4] To establish infringement of copyright, there must be the two elements of sufficient objective similarity between infringing work and the copyright work and that the copyright work must be the source from which the infringing work is derived.

[5] On the balance of probabilities and the evidence, the plaintiff was found not to be the author and that the copyright belongs to the 1st defendant.

[6] On the issue of damages, no special damages to be awarded because not specifically pleaded for, general damages for loss of business, goodwill and personal embarrassment to the sum of RM10,000.

Cases referred to:

University of London Press Ltd. v. University Tutorial Press Ltd. [1916] 2 Ch 601
MacMillan RM Co. Ltd. v. Cooper (K.J.) [1923] 40 TLR 186
Emerson v. Davies Storey's U.S. [1845] Rep 768
Francis Day & Hunter Ltd. v. Bron [1963] Ch 587

Legislation referred to:

Copyright Act 1969, ss. 2, (1), 4(1), 5(1)

Other sources referred to:
The Encyclopedia Britannica [1973] vol. 15 p. 907
Copinger and Skone on Copyright [1980] para. 456

For the plaintiff - S.Sivasubramanian & Mr. Mura Raju; M/s. S. Sivasubramanian
For the 1st defendant - Denis Appaduray & Mr. Andrew Wong Foh Hin; M/s. Ten Chin Yong & Appaduray
For the 2nd defendant - Wong Sai Fong; M/s. Shearn Delamore & Co.

JUDGMENT

Mohamed Dzaiddin J:

The motion film "Dia Ibuku" became the most successful Malay film produced by Sarimah Film Production Sdn. Bhd., the first defendant, in 1981. It won nine local "Oscars" at the Malaysian Film Festival in the same year organised by the Entertainment Writers and Journalists Association. Among the awards were "the best film"," the best actress", "the best screenplay" and "the best director". It is still a box office hit and has so far grossed about 1.2 million ringgit from its public screening in both Malaysia and Singapore cinema circuits and has by far surpassed the takings of most Malay films in the country.

The success of this film "Dia Ibuku" became a subject of controversy between the plaintiff and the defendants. The plaintiff has claimed that he is the author and owner of the copyright in a literary or dramatic work being a "film treatment" having a similar title as the film, which the plaintiff has alleged the first defendant has adapted or substantially reproduced his said work into this motion picture "Dia Ibuku". In short, the plaintiff says the first defendant has plagiarised his literary work in the form of a "film treatment" and reproduced it in the form of a cinematograph film "Dia Ibuku". At the same time, the plaintiff claims that Cathay Organisation (M) Sdn. Bhd., the second defendant, has distributed the said film and exhibited it to the public at its cinemas throughout the country. Therefore, the plaintiff now claims for a declaration that he is the author and owner of the "film treatment" and for an injunction to restrain both defendants from letting for hire or distributing and performing in public the said film "Dia Ibuku" and for damages, accounts of profits of all infringing films and costs in respect of the alleged infringement.

Naturally, both the first and the second defendants deny that the plaintiff is the author and owner of the copyright in the literary work entitled "Dia Ibuku". Hence, by way of a counterclaim, both the defendants are asking this Court for a declaration that the copyright in the cinematograph film "Dia Ibuku" belonged to the first defendant or, alternatively, such rights in the work have not been acquired by the plaintiff in Malaysia under the provisions of the Copyright Act 1969. (The words "The Act" hereinafter mentioned shall refer to the Copyright Act 1969).

In the course of the trial, I have had the opportunity of viewing the video tape version of this motion film "Dia Ibuku" (Exhibit D1). Briefly, the story is about a young widow Rohani, who toiled in the padi field, tapped rubber in the kampong and sold cakes at 'pekan saris' in order to give her two sons a good education. Both the sons were away from the mother, the elder son, Jamal, went on further studies overseas and the younger son, Jamil, stayed at a relative's house in Kuala Lumpur. Jamil only returned home during school holidays. The boys have no idea of the life and the work which the mother had to do in order to support them.

One day, after completing his Form V, Jamil returned to the kampong to see the mother; and it was here that he discovered the hard work and poverty in which the mother lived in order to support him. In the case of Jamal, it was only after his return from England that he learnt of the wretched life of the mother. It was on the occasion of his return from England that

enabled Rohani to make her trip from the kampong to Kuala Lumpur to meet Jamal and his fiancee, Juriah, who came from a rich family. It was at Juriah's house that Rohani came to know the father. He was Kudin, someone she had known before. Kudin could not believe his eyes when he saw Rohani. She denounced him as the person responsible for wrecking her life which led to the death of her husband, and he on his part started calling her a "prostitute". He chased her out of the house. He then took on Jamal and called him "the son of a prostitute". This shocked Jamal, who eventually became influenced by Kudin's accusation against the mother. Jamal began to despise his mother. On returning home, Rohani became very ill and was calling for her son, Jamal. It was the uncle, Salim, who eventually managed to trace him. Salim explained to Jamal the truth of the matter and persuaded him to return to the kampong. This he did and, on returning, he discovered the mother was seriously ill. He craved for forgiveness.

The basis of the plaintiff's claim is the so-called "film treatment" of "Dia Ibuku" (Exhibit P7), a work which the plaintiff claims as the author. It is pertinent to bear in mind at this stage that on the basis of the pleadings, the plaintiff did not at first claim copyright on P7 as his literary or dramatic work. The evidence which he led from witnesses who were actors and actresses in a stage-play indicated clearly that he was relying more on the stage production of his play called "Dia Ibuku" which was performed on 24 and 25 July 1964 at Kuala Trengganu. In fact, as late as September 1980, the plaintiff was still claiming that the film "Dia Ibuku" was based on his stage production bearing the same title. To me, this appeared very odd because according to his evidence and Yassin Salleh's (PW13) evidence, P7 had already been completed and brought back to Kuala Lumpur on 18 August 1980. (See the telegram dated 8 September 1980 - Exhibit P10). Here, I find as a fact that the plaintiff was concerned with and referring to his stage-play when he sent this telegram to PW13. This is further confirmed by the plaintiff's story in Watan dated 10 March 1981 where he still claimed on the basis of his stage-play. See A. 281 (Plaintiff's Bundle). However, after having found difficulty in getting the written script of the stage-play produced except the synopsis in the souvenir programme of the stage performance (Exhibit P4), the plaintiff in the course of the trial began to rely on P7 as a basis of his copyright claim against the defendants. Otherwise, the plaintiff would have been caught by the second limb of s. 4(2) of the Act. This section says that a literary, musical or artistic work shall not be eligible for copyright unless sufficient effort has been expended on making the work to give it an original character **and the work has been written down, recorded** or otherwise **reduced to material form.** It is my finding that the stage production of "Dia Ibuku" has not been written down recorded or reduced to material form. Neither can I accept the synopsis in P4 as a 'literary work' within the definition of s. 2 of the Act. Even assuming the script of the stage-play was available, in my opinion, being just a one-act play, it would be difficult for the plaintiff to show the substantial similarity in the plots, scenic effects and incidents when comparing the stage-play script with the cinematograph film "Dia Ibuku" (Exhibit D1). In such circumstances, the plaintiff cannot claim any protection in respect of this stage-play, which he has now rightly done so.

It is also not disputed that both the plaintiff and the first defendant are 'qualified persons' within s. 5(1) of the Act.

As I see it, the main issues in this case are as follows:

(1) Is P7 a piece of dramatic or literary work eligible for protection under the Act?

(2) Whether or not the plaintiff is the author of P7?

(3) Does the film "Dia Ibuku" reproduce the whole or substantial part of P7 either in its original form or in adaptation?

Let us first consider P7. This is a manuscript of 118 pages containing six sections which are divided into various scenes and sub-scenes. The words in the pages describe each scene. In each scene, there is also included the detailed technical effects, the cast and the props. Unlike a play, P7 does not contain any dialogue. Therefore, by itself I find that the pages merely contain a description of each scene, which is a sequence from one scene to another.

Now, the plaintiff called P7 a 'film treatment'. His witness, Zainal Abas (PW11), liked to call it a 'film treatment' in its raw form. According to PW11, a film treatment consists of a theme, story outline, characters, plots and sub-plots. It has also a background history of the various characters in their respective roles and functions. But I find P7 does not contain any theme or story outline.

In film production, it has been established over the years that there are normally three main stages of preparation before the actual shooting starts. The *Encyclopedia Britannica* (1973 Edition) Volume 15 under "Motion Picture" at page 907 summarised as follows:

> The first stage is the **outline.** As the term implies, it gives the essence of the action or story and may present either an original idea or, more usually, one derived from a successful stage play or novel. The outline is then built up into the **treatment.** This is a prose narrative, written in the present tense, in greater or less detail, that reads like a description of what will finally appear on the screen. This treatment is broken down into **screenplay** form, which, like its stage counterpart, sets out the dialogue, describes the movements and reactions of the actors and at the same time gives the breakdown of the individual scene, of the camera and the sound. It likewise serves as a guide to the various technical departments: to the art department for the sets, to the casting department for the actor, to the costume department, to make up, to the music department, and so on.

Here, having carefully considered its contents, by our local standard, I accept P7 as a film treatment.

Section 2(1) of the Act defines "literary work" to mean, irrespective of literary quality any of the following or works similar thereto:

(a) -
(b) plays, stage directions, film scenarios and broadcasting scripts;
(c) -
(d) -
(e) -
(f) -

The words "literary work" cover work which is expressed in print or writing, irrespective of whether the quality or style is high: See *University of London Press Ltd. v. University Tutorial Press Ltd.* [1916] 2 Ch 601, at page 608 per Peterson J. A film treatment like P7 should come within the work similar to (b) above. Here again, I accept P7 as a piece of literary work within the meaning s. 2(1) of the Act. Now, having held P7 to be a literary work, the next question is: Is it eligible for copyright? Section 4(1) of the Act says that subject to the provisions of this section, literary works shall be eligible for copyright. But, s. 4(2) says that a literary work shall not be eligible for copyright unless -

(a) sufficient effort has been expended on making the work to give it an original character; and

(b) the work has been written down, recorded or otherwise reduced to material form.

There is no quarrel as to (b). P7 is a written document. But, it is the ingredient (a) that calls for a discussion, because, in my view, the onus is on the author of P7 to show that sufficient effort has been expended on making the work to give P7 an original character.

The meaning of the word "original" in the English Copyright Act of 1911 (which is substantially similar to our own repealed F.M.S. Copyright Enactment (Cap.73)) was discussed in the judgment of Paterson J in *University of London Press Ltd. v. University Tutorial Press Ltd.* (*supra*), which has been cited with approval by the Privy Council in *MacMillan & Co. Ltd. v. Cooper* (K.J.) [1923] 40 TLR 186. This is what the learned Judge said:

> The word 'original' does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and in the case of 'literary work' with the expression of the thought in print or writing. The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work - that it should originate from the author.

In *MacMillan's* case (*supra*), Lord Atkinson, in delivering the judgment of the Court said:

> It will be observed that it is the product of the labour, skill, and capital of one man which must not be appropriated by another, not the elements, the raw material, if we may use the expression, upon which the labour and skill and capital of the first have been expended. To secure copyright for the product it is necessary that labour, skill, and capital of the first have been expended. To secure copyright for the product it is necessary that labour, skill and capital should be expended sufficiently to impart to the product some quality or character which the raw material did not possess, and which differentiates the product from the raw material.

Lord Atkinson then referred, with approval, to a decision of the Supreme Court of the United States in *Emerson v. Davies Storey's* [1845] *U.S. Rep* 768 bearing on the same point, and continued:

> It brings out clearly the distinction between the materials upon which one claiming copyright has worked and the product of the application of his skill, judgment, labour, and learning to these materials, which product, though it may be neither novel nor ingenious, is the claimant's original work in that it originates from him and is not copied.

On going through the various scenes in P7 and taking them as a whole, I find that a substantial amount of labour, skill and creativity on the part of the author was used to produce these 118 pages to give it an original character. After all, in the words of Peterson J (*supra*),

> the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work - that it should originate from the author.

In the above circumstances, in my judgment, P7 is a literary work and is a proper subject for copyright under the Act.

We next move to the second issue in this case: Who is the author of P7 and when was P7 written? See paragraph 4 of the statement of claim.

The onus is on the plaintiff to prove on the balance of probabilities that he is the author of P7.

We have first to consider the evidence leading to the emergence of P7. Here, we have two star witnesses for the plaintiff in the persons of the plaintiff himself and Yasin Sallah (PW13). Both know each other well, but at the time of the trial PW13 was an employee of the plaintiff and was staying with him in Kuantan for about three months before the trial. In his evidence,

the plaintiff stated P7 was thought of by him and it took him about fourteen days to write - three to four days to agree on the story-line and another five to six days to reduce into writing culminating in P7. He further stated that he wrote P7 all over the places in Kuantan - in his house, his office, in coffee-house and even in a motel. Insofar as Yassin Salleh's contribution, he stated that Yassin merely supplied him with technical advice. However, under cross-examination, the plaintiff said that even the props were his own ideas. As an example, he said, he used "fire-brigade" for rain. He understood the terms "dissolve", "dissolve to CU", "montage" as found in P7. He admitted that he consulted Yassin regarding using certain names of the characters in P7. From this evidence, it is fair to conclude, provided the Court believes, that it was the plaintiffs frenetic fourteen days' work that produced P7.

On the other hand, PW13 stated that immediately after signing a contract with the first defendant company dated 16 July 1980 (Exhibit D2), he was asked by Yusof Majid (DW1), the executive producer of the first defendant, to look for a suitable story for a film. Without going into greater details of his evidence, PW13 eventually came up with a story which finally became P7. According to him, he discussed with the plaintiff at Kuantan the concept of expanding the story "Dia Ibuku" based on the plaintiffs stage-play. At the preliminary stage, they discussed the framework (bentuk) and took down notes. It took them three to four days to agree on the story-line and another five to six days to reduce it into writing. He assisted and advised the plaintiff in the technical effects and terms used. He was present all the time when P7 was prepared by the plaintiff. Then, on 18 August 1980, he returned to Kuala Lumpur and brought along P7. At his home, he read P7 and started to type P7 with several alterations. This typewritten copy became D3 and he made three to four photostated copies of D3. On the next day, he went to see Yusof Majid at the first defendant's office at Petaling Jaya and gave him a copy of D3. He said that he took P7 with him to the office, but never gave it to Yusof Majid. He had P7 with him all the time. On the following day, Yusof Majid told him that the story was acceptable and he was asked to write the dialogue in Kuala Lumpur. He then sent a telegram (Exhibit P8) to the plaintiff informing him that his story was accepted in toto and that the producer was happy with it. This telegram was dated 21 August 1980. In the local film industry, the name Yassin Salleh is quite well-known. His experience as a motion film director included the direction of "Potret Maria" for Karya Film Production in 1979 where Sarimah Ahmad (DW3) played a leading role. She became impressed with him as a director which eventually led him to be employed by her company as the director for the film "Dia Ibuku".

It is my finding of fact that, firstly, P7 is a manuscript written by the plaintiff and, secondly, it originated after PW13 was appointed as a film director by the first defendant to direct "Dia Ibuku". However, from the evidence as a whole, I am satisfied and I have come to the conclusion of facts that the plaintiff is not the author of P7 to enable him to claim any ownership of this document and subsequently of the cinematograph film "Dia ibuku". I am very much inclined to think that P7 was copied from D3, the work of PW13. The bases of my conclusion are as follows.

Firstly, I accept the evidence of both the plaintiff and PW13 that they did discuss in Kuantan at the plaintiff's house some time in early August 1980 the story called "Dia Ibuku" based on the plaintiff's stage-play produced in Kuala Trengganu in July 1964. However, I have very grave doubts that P7 was substantially the product of the plaintiff and that PW13 merely assisted him in supplying the technical words as appearing in P7. It is no coincidence that P7 was prepared without any story outline, but to suggest that the plaintiff straightaway plunged into writing P7 and completed it within the period of fourteen days is, in the circumstances of this case, untenable.

Secondly, after having studied and scrutinised P7 and looking at the evidence as a whole, it is my finding that P7 is a document which could only have been written by someone having experience in writing film scripts and screenplay, some knowledge of the technique of film production and the know-how of the paraphernalia that constituted what is called, a film scenario. I find that P7 is not just what the plaintiff termed as a "film treatment". It is in fact a combination of a raw treatment and a screenplay without its dialogue. It describes the movements of the actors and actresses. It gives the break-down of the individual scenes and in some scenes, the role of the camera and the sound effects. It contains all the technical words, such as CU, SFX, Montage, etc., which words are only too familiar to those having inside knowledge of film making. In addition, this document, since it was based on the plaintiff's one-act stage-play, would require for the purpose of turning it into a film script and representation in its present form, a great deal of adaptation, expansion and arrangement.

The question asked is: how does the plaintiff fit into this? Based on his experience in film production (which is nil), I have the gravest doubt that he is the author of this document. In his evidence, he appeared to give me the impression that he is a person of great versatility - from a school teacher to dramatist, a columnist, a poet, a pantomime producer, short story writer, an electrical contractor and last, but not least, an ex-politician. However, what is significant for the purpose of this case is that he has no experience whatsoever in writing a film script (although he claimed that he co-authored a film script "Gerhana Pelangi" with PW13). It is also significant to note that the experience which he claimed he had in his evidence were between the years 1960 and 1968. Thereafter, he had done nothing in the field of literary writing until some time in August 1980, after a span of twelve years when he suddenly became a prolific writer which enabled him to produce his masterpiece P7 within a period of two weeks. To me, P7 is not just a film script for the purpose of giving PW13 an opportunity to bring back to Kuala Lumpur for him to show Yusof Majid for his approval. P7 has already a detailed screenplay, but without a dialogue. For a person who lacked experience in writing film scripts and who has laid off for some years, it is my finding of fact that the plaintiff could not have written P7 in its present form within two weeks. My conclusion on this point is fortified by the evidence of Omar bin Puteh, also known as Amir Jarr (DW4) whose evidence in this aspect I believe and accept. When questioned about P7, he said that he first saw it some time after the plaintiff's injunction proceeding which was filed on 28 April 1981. He studied the contents. In his opinion, P7 could only be written by a person who has experience in script writing for film. It is difficult to prepare and complete it within two weeks. In his own experience, he said it would take him about one month to complete one script. He found that there were a number of scenes which were well arranged and it would be difficult to complete the whole of P7 within the two week period, even though the writer might have assistance from others.

This witness (DW4) is also well known in our local film industry as a script writer. Although a full-time journalist with Utusan Melayu Press, he is a free lancer and has written a number of film scripts, notably films like "Detik 12 Malam", "Jejak Bertapak" and "Dia Ibuku" which won him the Oscar for the best screenplay.

Thirdly, even assuming that P7 was written by the plaintiff and assisted by PW13, there appeared to be a mystery as to why P7 was never produced or shown by PW13 to DW1 as soon as he returned to Kuala Lumpur on the morning of 18 August 1980. According to the evidence of PW13, he said that on his return from Kuantan, he went home straight to his house at Pantai Dalam, Kuala Lumpur. He read P7 at his house and started to type it on his own typewriter. He only typed one copy and made three to four photostated copies of this document, D3. He admitted making several alterations from P7. He gave a copy of D3 to

DW1 at his office, but never showed him P7 although he had with him at the office. On the strength of D3, DW1 told him the following day that the story was acceptable and that he could write the dialogue in Kuala Lumpur. He then commenced discussion with his assistant director named S. Sahalan regarding the preparation of screenplay and dialogue based on D3. Consequently, from D3, the Story Board Committee produced about 20 copies of screenplay book (Exhibit P15). There were several meetings held together with DW1, Sarimah DW3, DW4 and Omar Kamaruddin D5. Again, from this evidence, it is established that throughout this period none of these witnesses knew about the existence of P7 which was in the possession of PW13. (Or would it be more correct to say the 'non-existence' of P7?). Nor did any of these witnesses, in particular DW4, the screenplay writer, ever see P7 although PW13 stated that he had it with him in the defendant's office. It would be logical and reasonable for PW13 to mention about P7 to DW1, the person responsible for asking him to look for a story for the film and DW4 the person assigned to prepare the screenplay. However, neither of these two persons knew anything about P7. What DW4 stated in his evidence was that it was never shown to him on 16 September 1980, the day when he started working to write the screenplay. He only saw P7 after the injunction proceeding.

But lo and behold! about eight months later, on 28 April 1981, P7 re-emerged from the secret custody of PW13 and came into the hands of the plaintiff. The plaintiff stated that he received P7 intact from PW13 at Kuala Lumpur. On that date, P7 because an exhibit in support of the plaintiff's affidavit for his interim injunction application.

Looking at the evidence, there is this irresistible inference that at the time when PW13 convened the Story Board Committee meeting to discus the dialogue based on D3, P7 was never in existence. Otherwise, there was no reason for PW13 to hid P7 by not showing it to the persons I have mentioned earlier, let alone mentioning about P7 to them. After all, PW13's trip to Kuantan had the full blessing of DW1.

Having come to the above conclusion, I find that it is more probable that P7 was copied from D3 and written in the plaintiff's own handwriting. Its birth must have been 'doctored' by the plaintiff in corroboration with PW13 some time between 8th September 1980 (date of plaintiff's telegram to PW13) and 28 April 1981 (the time when P7 was officially produced and exhibited in Court). Of course, when comparing both D3 and P7, there were certain omissions, alterations and additions of scenes and sub-scenes. Naturally, there are bound to be so. Otherwise it would be direct copying. In addition, I find also as a fact that the names of the principal characters in D3 or in the film (D1) itself when compared with P7 are quite similar in sound. In this instance, at least two names are definitely similar. Jamil, the younger son in the film, remains as Jamil in P7 and Ka Itam, the friendly neighbour in the film, becomes Mak Hitam in P7. As for other names, Siti, the mother in P7 becomes Rohani and Kudus, the villian in P7, becomes Kudin in the film, **Kamal,** the elder son in P7, becomes **Jamal** in D3 and in the film. In this respect, strange as it may seem, not all the time the name **Kamal** was used by the plaintiff in his P7. Clearly, it cannot be a coincidence or an error of judgment on his part or a mistake in the spelling when the plaintiff distinctly and unmistakenly wrote the name **Jamal** (as opposed to **Kamal**) in Scene 6.8 of his P7. The inescapable inference here would be that the plaintiff must have been aware or known the name Jamal was used in D3. That being the case, it is more probable that the plaintiff might have copied it from D3, which again goes to prove that D3 has existed earlier than P7.

Needless to say, P7 is the *raison d'etre* of the plaintiff's case, for without it there would be absolutely no basis for his claim.

Thus, based on the plaintiff's own case, and on the balance of probabilities, in my judgment, the plaintiff has not proved that he is the author of P7; and on this issue alone, the plaintiff's claim is dismissed with costs.

In fairness to the plaintiff, I wish to emphasise here that it is my finding, based on the evidence of Yusof Majid (DW1) after having seen and heard him from the witnesses-box, I cannot accept his evidence that the story in "Dia Ibuku" was based on the 18-point ideas which he originated. In fact, I daresay that these ideas were of his own concoction and fabrication. However, as the plaintiff has failed to prove on the balance of probabilities of his own case that he is the author of P7, I have therefore no alternative but to dismiss his claim, although I disbelieve DW1's evidence.

As I have already found that the plaintiff has not proved his case, I need only consider briefly the third and final issue, i.e. whether the film "Dia Ibuku" reproduces the whole or substantial part of P7. Here, I would adopt the principle enunciated by Diplock LJ in *Francis Day & Hunter Ltd. v. Bron* [1963] Ch 587 at page 623 who stated that for there to be infringement of copyright:

> there must be present two elements: first, there must be sufficient objective similarity between the infringing work and the copyright work, or substantial part thereof for the former to be properly described, not necessarily as identical with, but as a reproduction or adaptation of the latter; secondly, the copyright work must be the source from which the infringing work is derived.

As has been explained elsewhere, what the second ingredient means is that there must be some causal connection between the infringing work and the copyright work. *Copinger and Skone on Copyright*, 1980 Edition, at paragraph 456 says that the defendant is not liable if he has taken from the work the essential idea, however original, and expressed the idea in his own form, or used the idea for his own purposes. But the defendant must, to be liable, have made a substantial use of the form in which the thought or information is expressed. In paragraph 457, the authors submit that the work "copyright" itself indicates that the right given is confined to copying in some form the work to which copyright protection is afforded and does not extend to an independent production of the original. As Lord Atkinson pointed out in *MacMillan's* case, the moral basis upon which the protective provisions of the English Copyright Act 1911 rested was the Eighth Commandment: "Thou shalt not steal".

On the basis of the above principle, I have considered and compared P7, D3, P15 and D1 and I have come to a finding that there was in fact substantial similarities between P7 and D1.

Before dealing with the defendants' counterclaim, I should comment on some of the material allegations as pleaded in the plaintiff's statement of claim.

Paragraph 6 states as follows:

> The Plaintiff then let the said Yassin bin Salleh take the said literary or dramatic work "Dia Ibuku' to Kuala Lumpur to consult with the first defendant if the same could be reproduced into a film and if it was found suitable the first defendant and the plaintiff were to enter into a formal written agreement including terms for payment of royalty, upon which the plaintiff would give to the first defendant and others the licence to reproduce the said literary or dramatic work into a film to be distributed for purposes of hire or trade.

Looking at the plaintiff's evidence, it is established, firstly, at all times he had no direct dealing with the first defendant. Secondly, the story that the plaintiff and PW13 first took back to Kuala Lumpur in July 1980 for consultation was 'Gerhana Pelangi', which was rejected by

Yusof Majid (DW1). Assuming that I accept the plaintiff's evidence, there is no longer any necessity of consulting the first defendant on the literary or dramatic work 'Dia Ibuku', as pleaded, because according to the plaintiff while he was still in Kuala Lumpur PW13 told him that Sarimah (DW4) had agreed about 'Dia Ibuku' and that both of them should return to Kuantan to write the script(which is, of course, denied by the first defendant). At this meeting in Kuala Lumpur, the plaintiff stated that there was no mention of any payment, nor did he bring up the matter to PW13. Surprisingly, it was only at a subsequent meeting on the evening of 9 September 1980 at his house at Kuantan that this question of compensation (through the quantum was never agreed) was discussed with PW13 and S. Sahalan. Again, the question of entering into a formal written agreement (as pleaded) was not discussed. Even if it was mentioned, there were no evidence from PW13 that he conveyed all these matters to the first defendant.

In the circumstances, I find that the plaintiff has not proved paragraph 6 of the statement of claim because what is pleaded therein appears to be different from the plaintiff's own evidence.

With regard to the defendants' counterclaim, in my judgment, the first defendant is entitled to a declaration which I hereby order that the copyright in the cinematograph film "Dia Ibuku" belongs to the first defendant. As for damages, it is clear from the pleading that the first defendant is merely asking for general damages as they have not particularised the special damages. Although it was submitted that the first defendant was entitled to special damages for loss on account of cancellation of the midnight shows, regrettably, this has not been specifically pleaded. In the circumstances, I cannot allow any claim for special damages. On general damages, the fact that this case has received a lot of publicity in the local media, does not preclude me from considering based on the evidence whether the first defendant have suffered loss to entitle them to an award of general damages. As a result of the plaintiff's action, the entire set of film "Dia Ibuku" was prevented from public screening in cinemas. Now, that the case is over, both defendants can start re-screening that said film. Thus, on this basis, it is a matter of speculation whether less or more people would swarm the cinema halls to see this film. But with the attendant publicity given by the media to this trial, I am sure more people would pay to see the film. However, it is a fact that the first defendant is a limited company and DW3 is a well-known film actress. The trial of this action must have put them into great stress and agony and, as such, they must have suffered damages in the form of loss of business, goodwill and personal embarrassment and as such it is fair and reasonable for me to award them the sum of RM10,000 as general damages. Costs of the counterclaim to be paid by the plaintiff to the defendants to be taxed by the proper officer of the Court.

Finally, what has come out loud and clear from this trial is that there was in fact a play staged in Kuala Trengganu in July 1964 called "Dia Ibuku" written and produced by the plaintiff and that in 1981 there was a cinematograph film of similar title produced by the first defendant. However, much as I sympathise with the plaintiff, on the basis of our own Copyright Act and on the balance of probabilities, the plaintiff has failed to prove that he was the author of the film script (P7) to entitle him to claim ownership of the film "Dia Ibuku".

Also found at [1984] 1 CLJ 105